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No. 86-1166

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE MAY DEPARTMENT STORES COMPANY, WEST PARK ASSOCIATES, MAY CENTERS, INC., MAY CENTERS OF CAPE, INC., DRURY INDUSTRIES, INC. and CHARLES L. DRURY,
Petitioners,

vs.

WESTBOROUGH MALL, INC., GEORGE STAPLES, JR., and WESTBOROUGH MALL ASSOCIATES,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Westborough Mall, Inc., George Staples, Jr., and Westborough Mall Associates,[1] plaintiffs-appellants in the action below, respectfully urge that the petition for writ of certiorari sought by petitioners be denied. The decision below clearly does not warrant review by this Court in that it does not conflict with the decision of another federal court of appeals and was correctly decided as to all issues. The questions presented by petitioners involve issues of evidence and factual findings which are not only unique to this case, but which remain to be resolved, upon remand, by a jury.

1. None of the respondents has any parent or subsidiary corporation (other than wholly-owned subsidiaries) or affiliated corporations which have public shareholders within the meaning of Rule 28.01 of this Court.

In *Westborough Mall v. City of Cape Girardeau,* 794 F.2d 330 (8th Cir. 1986) (*"Westborough II"*), the Appellate Court concluded that erroneous jury instructions pertaining to the respondents' due process claim in effect took respondents' Count II conspiracy claim away from the jury, thus requiring a new trial as to all claims and defendants. Count II was totally dependent on Count I because it alleged the same allegations of constitutional deprivations as were alleged in Count I.

In their petition for writ of certiorari, petitioners do not challenge the correctness of the Eighth Circuit's determination regarding the misleading nature of the jury instructions, nor do they fault the conclusion that the misdirection caused by the instructions prevented the jury from properly considering the Count II conspiracy claim. Similarly, petitioners do not claim that the Eighth Circuit's decision in *Westborough II* conflicts with any decision of this Court or any other federal court as to the effect of or remedy for instructional errors. Instead, petitioners ask this Court to determine the sufficiency of the evidence by sifting through the many transcripts and exhibits of a ten-day trial.

To justify review, the petition—liberally salted with rhetoric—claims that *Westborough I* and *II* represent such pronounced departures from well-accepted principles of decision-making that they call for this Court's attention and correction. But nowhere do petitioners state *how* or in *what* manner the Eighth Circuit has so departed from the accepted and usual course of judicial proceedings as to require the Supreme Court's supervision. Obviously, the Eighth Circuit's decision in *Westborough I* has no bearing upon the present petition, and is simply irrelevant in light of this Court's prior denial of certiorari. *Westborough Mall*

v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. 945 (1983). Moreover, in all respects, questions raised by petitioners relating to fact, and inferences to be drawn from the evidence, are not proper bases for certiorari. These questions should be submitted to a jury upon proper instructions, not to the Supreme Court.

In all respects, it is clear that this Court's intervention is not needed, and the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Petitioners' statement of the case presents a conspicuously biased and inaccurate description of the present posture of this case. Moreover, petitioners' characterizations of the evidence presented at trial and the inferences from such evidence are simply irrelevant and unnecessary for a determination of their present petition.

These characterizations are irrelevant because petitioners' challenge is actually directed only to the judicial discretion of an appellate court regarding disposition of an appeal once error is found, not to the evidence itself.

In *Westborough II,* the Eighth Circuit found that remand as to the entire case was appropriate because a misdirection by the district court on the due process claim prevented the jury from properly considering *any evidence* on the conspiracy claim. The interdependency of the conspiracy and due process claims required reversal.

In any event, the Eighth Circuit's summary of the facts and procedure is more concise and accurate than petitioners' statement. (*See,* Appendix A at A-42 to A-46). Respondents likewise adopt and incorporate the statement

of the case contained in Respondents' Brief in Opposition to the City of Cape Girardeau's Petition for Writ of Certiorari at pages 3-5).

REASONS FOR DENIAL OF WRIT

From the outset of petitioners' argument, it is obvious that review is sought to have this Court consider the evidence adduced in a ten-day trial. A writ of certiorari should not be granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Given the present posture of this case, a review of what the evidence may or may not show is premature. The Eighth Circuit in *Westborough I* (not *Westborough II*) concluded that respondents' evidence could support claims for violation of procedural due process and conspiracy. It then became appropriate for a jury, *after proper instructions*, to weigh the evidence and reach a verdict. The petitioners are still complaining about the court's decision in *Westborough I*, not the Eighth Circuit's holdings about jury instructions in *Westborough II*.

Petitioners' failure or inability to suggest how the Eighth Circuit's opinion in *Westborough II* is erroneous or reversible indicates that a writ of certiorari is not appropriate. The Eighth Circuit's decision announced no new legal principles nor did it depart from well-settled standards of review. Rather, the Eighth Circuit determined that a number of jury instructions given by the district court were prejudicially erroneous and misleading, requiring a new trial. Notably absent from the present peti-

tion for writ of certiorari is any assertion of error regarding the Eighth Circuit's findings as to the jury instructions. Petitioners do not contend that *Westborough II* is in conflict with any decision of this Court or any other federal court. Petitioners merely claim that the Court of Appeals "inexcusably refused to discuss the submissibility of the case against petitioners." (Petition at 8). Obviously, since submissibility requires a complete examination of the evidence, petitioners are asking this Court for a complete review of all evidence adduced during trial as well as a judicial determination of the proper inferences to be drawn from the evidence. But this Court does not sit to review evidence and inferences. Thus, there is simply no justification for a review by the Supreme Court here.

Respondents alleged in Count I of their complaint that the City violated their procedural due process rights. In Count II, the respondents again alleged violation of those same procedural due process rights, adding only that the City and the private defendants-petitioners conspired to deprive respondents of those rights. For that reason, Count II was totally dependent on Count I. The jury could not have found liability on Count II, given its verdict on Count I; and, the private defendants-petitioners could be found liable if, and only if, the City was found liable. Simply stated, the erroneous instructions effectively took the conspiracy claim away from the jury.

Accordingly, the Eighth Circuit's discretion to make determinations concerning disposition of the appeal, once error was found in the instructions, was not abused. Indeed, petitioners focus their current attack, not upon the holdings of *Westborough II* in this regard, but upon their continuing belief that *Westborough I* was "an obviously flawed appellate opinion." Review of *Westborough II* is sought merely out of petitioners' belief that

the Eighth Circuit failed to see the error of their ways in *Westborough I.*

In other words, very little has been stated by the petitioners except *their* opinion that a second trial is unnecessary. To the contrary, the Eighth Circuit believed that the jury was not given proper guidance on complex issues involving the petitioners' deprivation, under color of law, of the respondents' constitutional rights. We respectfully submit that it is the jury that should now turn to the evidence, not the Supreme Court of the United States.

CONCLUSION

Petitioners have pointed out no error by the Court of Appeals and have raised no issue warranting review. This case will be decided by a jury's determination of the facts. It will turn upon its own facts and will affect few, if any, other litigants. Therefore, the petition for writ of certiorari should be denied.

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